

International Longshoremen's Association, Local No. 307, AFL-CIO (West Gulf Maritime Association) and Trinidad Pimentel, Daniel F. Nelson, Jr., Marco Antonio Rabago, and Hector Bautista Contreras. Cases 23-CB-1798, 23-CB-1799, 23-CB-1829, and 23-CB-1831

August 21, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On January 12, 1981, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. Administrative Law Judge James T. Youngblood excused himself on January 31, 1978, after the original hearing in the instant case had closed before him and after the filing of briefs. Subsequently after various motions, on October 18, 1978, the Board issued an order remanding this proceeding for a hearing *de novo* before another administrative law judge. Pursuant to the Board's Order, this matter was heard *de novo* by Administrative Law Judge James T. Rasbury. On June 20, 1980, after the hearing in the instant case had closed, and after the filing of briefs, Administrative Law Judge Rasbury died. Thereafter, on August 20, 1980, Deputy Chief Administrative Law Judge James T. Barker designated Administrative Law Judge Jerrold H. Shapiro to prepare and issue a decision based on the record made before Administrative Law Judge Rasbury. In cases of credibility resolutions, Administrative Law Judge Shapiro was also empowered to look to the record made before Administrative Law Judge Youngblood.

It is the Board's established policy to attach great weight to an administrative law judge's credibility findings, insofar as they are based on demeanor. However, in contested cases, the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of evidence and the Board is not bound by the administrative law judge's findings of facts, but bases its findings upon a *de novo* review of the entire record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Administrative Law Judge Shapiro's credibility findings are based on factors other than demeanor, and in consonance with the Board's policy set forth in *Standard Dry Wall Products, Inc.*, *supra*, we have independently examined the record in this case. We find there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon.

In his exceptions, the General Counsel argues that the Administrative Law Judge relied on the evidence incorrectly in dealing with complaint pars. 11 and 15. The General Counsel states that the evidence used by the Administrative Law Judge in recommending the dismissal of par. 11 actually went to prove par. 15. The General Counsel further states that the evidence used by the Administrative Law Judge in recommending the dismissal of par. 15 actually went to par. 11. We have examined the evidence in the manner suggested by the General Counsel and find that, even applied in such a manner, that evidence does not establish that Respondent violated the Act as set forth in complaint pars. 11 and 15.

Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, International Longshoremen's Association, Local No. 307, AFL-CIO, Galveston, Texas, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

In his discussion of complaint par. 21(c), the Administrative Law Judge found that A. Rabago was a member of Respondent. In fact, A. Rabago was not a member of Respondent. However, we find that the Administrative Law Judge was correct in dismissing this allegation of the complaint since there is no showing in the record that any one key position is superior to another. Inasmuch as both the positions of winch operator and driver are key positions, and alleged discriminatee Pimentel was reassigned to the key position of driver, we find no violation of the Act in this reassignment. Finally, in adopting the Administrative Law Judge's recommendation to dismiss the allegation of the complaint (par. 18) involving an alleged discriminatory reassignment by Gang Foreman Van Slyke, we rely solely on the Administrative Law Judge's credibility resolution.

² The Administrative Law Judge noted in his Decision that Respondent had previously been found in violation of the Act in Cases 23-CB-1635 and 23-CB-1647-1. He found therefore, citing *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), that a broad cease-and-desist order was appropriate. We note that the Union did not except to the decision of the Administrative Law Judge in Cases 23-CB-1635 and 23-CB-1647-1. As we have held previously, an administrative law judge's decision with which a respondent voluntarily complies without taking exceptions does not standing alone provide a basis for finding a proclivity to violate the Act. *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (H. A. Carney and David Thompson, Partners, d/b/a C & T Trucking Co.)*, 191 NLRB 11 (1971); *Broadway Hospital, Inc.*, 244 NLRB 341 (1979). Therefore, consistent with *Hickmott Foods, supra*, we will modify the Administrative Law Judge's recommended Order to include a narrow cease-and-desist order.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discriminate against employees or applicants in the assignment of jobs through our exclusive hiring facility because of their lack of membership in our Union.

WE WILL NOT cause or attempt to cause West Gulf Maritime Association or any of its

employer members or any other employer engaged in commerce to discriminate against employees or applicants for employment in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL NO. 307, AFL-
CIO

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this consolidated proceeding was held in 1980 on February 20 through February 22 before Administrative Law Judge James T. Rasbury based on unfair labor practice charges filed against International Longshoremen's Association, Local No. 307, AFL-CIO, herein called Respondent, by Trinidad Pimentel, Daniel F. Nelson, Jr., Marco Antonio Rabago, and Hector Bautista Contreras. The charge in Case 23-CB-1798 was filed by Pimentel on January 12, 1976. The charge in Case 23-CB-1799 was filed by Nelson on January 12, 1976. The charge in Case 23-CB-1829 was filed by Rabago on February 6, 1976, and the charge in Case 23-CB-1831 was filed by Contreras on February 10, 1976. A consolidated complaint based on the aforesaid charges issued May 14, 1976, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 23, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, herein called the Act. The consolidated complaint was thereafter amended. Respondent filed an answer and an amended answer denying the commission of the alleged unfair labor practices.¹

On various dates between April 20 and July 27, 1977, a hearing was held in this proceeding before Administrative Law Judge James T. Youngblood. Following the close of the hearing and the submission of briefs the Charging Party in Case 23-CB-1799, Daniel Nelson, Jr., by letter dated September 18, 1977, submitted certain complaints to the Regional Director about the conduct of the hearing. Administrative Law Judge Youngblood learned of these complaints and by order dated November 7, 1977, directed Nelson to comply with Section 102.37 of the Board's Rules and Regulations, Series 8, as amended, if Nelson wished formally to request Administrative Law Judge Youngblood to disqualify himself

from this proceeding. By letter dated November 22, 1977, the Charging Party Nelson made such a formal request. By order dated January 31, 1978, Administrative Law Judge Youngblood, over the opposition of Respondent and the General Counsel, recused himself from the case.

Thereafter, Associate Chief Administrative Law Judge Arthur Leff issued a telegraphic Order To Show Cause in which he directed the parties to state their position regarding the alternative possibilities of conducting a hearing *de novo*; submitting the record to another administrative law judge for decision on the record, or transferring the case directly to the Board for decision. By response of April 20, 1978, the General Counsel requested that the case be transferred to the Board and stated that Charging Parties Pimentel and Rabago supported the General Counsel's request.² Charging Party Nelson also agreed to transfer the case to the Board, but requested that the transfer be postponed until after the conclusion of the Board's enforcement proceeding against Respondent in a prior case. Respondent alternatively requested that the record be transferred directly to the Board or to another administrative law judge. On May 30, 1978, the General Counsel filed with the Board a "Motion To Transfer and Continue Case Before the Board." On June 2, 1978, the Board granted the General Counsel's motion.

On October 18, 1978, the Board issued an order remanding proceeding to the Regional Director for a hearing *de novo*, which in pertinent part stated:

Upon review of the record, the Board is now of the opinion that the General Counsel's motion to transfer this proceeding was improvidently granted as the merits of the complaint's allegations cannot be decided on the basis of the transferred record with specific credibility resolutions by an Administrative Law Judge. In this regard, a review of the record herein [not undertaken at the time the June 2 order issued] reveals conflicting testimony on key portions of the complaint which cannot be resolved without the aid of credibility resolutions from one who is able to view the demeanor of the witnesses. Therefore, while the Board is aware of the inconvenience and expense that will result from remanding this proceeding, the Board concludes that it has no choice but to rescind its Order of June 2, 1978, and remand the case for a hearing *de novo* before another Administrative Law Judge.

Thereafter, on November 13, 1978, Respondent filed a "Motion To Vacate Order and Return Proceedings to Chief Administrative Law Judge," in which Respondent argued that there was no provision in any of the Board's Rules and Regulations for a trial *de novo* under any circumstances and requested, *inter alia*, that the Board refer these proceedings to the Chief Administrative Law Judge with instructions to refer the case for decision by some other administrative law judge.

¹ Respondent's answer admits that it is a labor organization within the meaning of Sec. 2(5) of the Act. The record also establishes that during the time material Respondent was a party to a collective-bargaining agreement containing an exclusive hiring hall arrangement with employers who meet the Board's applicable discretionary jurisdictional standards and are employers within the meaning of Sec. 2(6) and (7) of the Act. I therefore find that it will effectuate the policies of the Act for the Board to assert jurisdiction herein.

² Charging Party Contreras was deceased, having died during the course of the hearing before Administrative Law Judge Youngblood.

On February 2, 1979, the Board issued an order denying Respondent's motion to vacate the order and return proceedings to the Chief Administrative Law Judge.

Thereafter, pursuant to the Board's order remanding the proceeding to the Regional Director for hearing *de novo*, this matter was heard *de novo* on February 20 through February 22, 1980, by Administrative Law Judge James T. Rasbury. On June 29, 1980, after the close of the hearing and the submission of briefs, Administrative Law Judge Rasbury died.

On July 10, 1980, Deputy Chief Administrative Law Judge James T. Barker issued an Order To Show Cause directing the parties to state their position regarding the alternative possibilities of settling this case, transferring the record directly to the Board for decision, submitting the record to another administrative law judge for decision, or having a hearing *de novo*. By response of July 23, 1980, the General Counsel requested that another administrative law judge be designated by the Deputy Chief Administrative Law Judge to prepare and issue a decision on the record which had been made before Administrative Law Judge Rasbury and stated that the Charging Parties subscribed to the General Counsel's position. By response of July 29, 1980, Respondent took the position that its preferences in the order in which they are listed were as follows: (1) the separate records made before Administrative Law Judges Youngblood and Rasbury be referred to a newly designated administrative law judge to prepare and issue a decision; (2) the separate records made before Administrative Law Judges Youngblood and Rasbury be referred to the Board to prepare and issue a proposed decision; (3) the record made before Administrative Law Judge Rasbury be referred to the Board to prepare and issue a proposed decision; (4) the record made before Administrative Law Judge Rasbury be referred to a newly designated administrative law judge to prepare and issue a decision; (5) a partial trial *de novo*, with the records made before Administrative Law Judges Youngblood and Rasbury being referred to a newly designated Administrative Law Judge for delineation as to those witnesses which the administrative law judge concluded it would be necessary to observe in order to resolve questions of credibility; and (6) the fifth alternative, but using solely the record made before Administrative Law Judge Rasbury.

Having considered the aforesaid responses of the parties, Deputy Chief Administrative Law Judge Barker, by letter dated August 5, 1980, advised the parties:

... absent settlement of the case or consent by 11 parties to transfer the case directly to the Board either on the basis of Respondent's alternative (2) or alternative (3), I shall designate another Administrative Law Judge to prepare and issue a decision on the record made by Judge Rasbury. This designation would be made on August 18, 1980, unless good cause is shown in writing, on or before the close of business August 15, 1980, disclosing settlement of the case or warranting an alternative course of action.

By response dated August 11, 1980, Respondent took the position that:

Respondent objects to and takes exception to your decision to refer only the record made before Judge Rasbury to a newly designated Administrative Law Judge to prepare and issue a decision. To do so is to deprive the newly designated Administrative Law Judge of the opportunity to take into consideration the very first testimony of the witnesses herein before they had the opportunity to rethink their testimony based upon their earlier appearances testifying before Judge Youngblood.

Thereafter, after considering Respondent's August 11, 1980, response, Deputy Chief Administrative Law Judge Barker, by order issued August 20, 1980, designated me "in the place and stead of Judge Rasbury for the purpose of preparing and issuing a decision and recommended order consonant with the terms of this Order, as well as for all other purposes relating to the performance of his functions and responsibilities as the designated Administrative Law Judge." This order adopted the position taken by Respondent in its August 11, 1980, response wherein, as described *supra*, Respondent in effect requested that the newly designated administrative law judge be allowed to review the record made before Administrative Law Judge Youngblood, besides the Rasbury record, for the purpose of evaluating the credibility of those witnesses who had testified in both proceedings. In this regard Deputy Chief Administrative Law Judge Barker's August 20, 1980, order set out the following guidelines for the use of the Youngblood record in the present proceeding:

In view of the preference of the parties for the designation of another Administrative Law Judge to render a decision herein without a *de novo* trial, I deem it appropriate in the circumstances of this case to designate another Administrative Law Judge to prepare and issue a decision and recommended order. I now conclude, however . . . that the newly designated Administrative Law Judge in preparing his Decision should not be restricted to consideration of the record made before Judge Rasbury if in his judgement that record presents credibility issues that cannot be resolved to his satisfaction on the basis of that record alone, without giving collateral consideration for credibility purposes to the testimony of witnesses who appeared before Judge Youngblood, as reflected in the transcript of that earlier proceeding.

Administrative Law Judge Barker's August 20, 1980, order concluded by notifying the parties that "all further communications or motions in this case should be addressed to Judge Shapiro."

None of the parties has in fact subsequently communicated with me concerning the August 20, 1980, order. But, on August 6, 1980, Respondent, by letter addressed to Deputy Chief Administrative Law Judge Barker, took the position that his order of August 20, 1980, was erroneous insofar as it did not permit the designated adminis-

trative law judge to take into consideration the record made before Administrative Law Judge Youngblood for all purposes, substantive as well as for purposes of evaluating credibility, and in particular objected to Deputy Chief Administrative Law Judge Barker's failure to permit the newly designated administrative law judge from considering the testimony of Gang Foreman Enfinger and Walking Foreman Hyatt, who testified on behalf of Respondent before Administrative Law Judge Youngblood but were not called upon by Respondent to testify before Administrative Law Judge Rasbury.³

Upon the entire record,⁴ and having considered the post-hearing briefs submitted by the General Counsel and Respondent, I make the following:⁵

³ During the hearing before Administrative Law Judge Rasbury Respondent moved that the testimony of Enfinger and Hyatt presented before Administrative Law Judge Youngblood be considered inasmuch as they resided more than 100 miles from the site of the hearing, thus, Respondent argued, Respondent was unable to compel their attendance by means of a subpoena and for this reason had not subpoenaed them. Administrative Law Judge Rasbury correctly denied Respondent's motion inasmuch as Respondent, pursuant to Sec. 11 of the Act, had the right by means of subpoena to compel the attendance of Enfinger and Hyatt from any place in the United States. In this regard Sec. 11 of the Act, in pertinent part states:

The Board, or any members thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. . . . *Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.* [Emphasis supplied.]

⁴ The record herein consists of the record made by the parties before Administrative Law Judge Rasbury which has been considered for all purposes. I have also considered the record made by the parties before Administrative Law Judge Youngblood, but only for the purpose of evaluating the credibility of witnesses who testified before Administrative Law Judge Rasbury after having testified before Administrative Law Judge Youngblood. I have not considered anything in the Youngblood record as substantive evidence. As I have described *supra*, subsequent to the issuance of Deputy Chief Administrative Law Judge Barker's August 20, 1980, order designating me as Administrative Law Judge in place of Administrative Law Judge Rasbury, Respondent took the position that the order was prejudicial and objectionable because it did not authorize me to consider the evidence included in the Youngblood record as substantive evidence, particularly the testimony presented by Respondent's witnesses Enfinger and Hyatt who testified before Administrative Law Judge Youngblood but not before Administrative Law Judge Rasbury. As described *supra*, Respondent, prior to the issuance of Deputy Chief Administrative Law Judge Barker's August 20, 1980, order, in response to this Order To Show Cause, did not indicate that it was conditioning its acceptance of a newly designated judge upon the use of the Youngblood record for purposes of substantive evidence as well as for credibility purposes. Quite the contrary, when asked by Deputy Chief Administrative Law Judge Barker to state its position with respect to the designation of another judge to replace Administrative Law Judge Rasbury for the purpose of deciding this case without a *de novo* hearing, Respondent in its response stated in effect that it was amenable to such a procedure so long as the newly designated judge considered the Youngblood record for the purpose of evaluating the credibility of witnesses who had testified before Administrative Law Judge Youngblood and then Administrative Law Judge Rasbury. It was based upon this response to his Order To Show Cause that Deputy Chief Administrative Law Judge Barker issued his final order of August 20, 1980. Under these circumstances, whatever the merit of Respondent's objection to the failure of the August 20, 1980, order to permit me to rely on the Youngblood record for all purposes rather than just for the purpose of evaluating witnesses' credibility, the objection is untimely.

⁵ As I have indicated *infra*, there are certain allegations in the complaint, albeit not many, which were difficult to resolve inasmuch as I did not have the benefit of observing the witnesses' demeanor. In each such

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background⁶

Since at least 1966, Respondent has maintained and administered an exclusive hiring hall for the referral of longshoremen to load and unload ships in Galveston, Texas, pursuant to successive collective-bargaining agreements between an association of employers, West Gulf Maritime Association, and the Respondent's parent organization, South Atlantic and Gulf Coast District, International Longshoremen's Association, AFL-CIO.

Pursuant to the aforesaid collective-bargaining agreement the Respondent supplies required longshoremen shipside, at which time they are hired by the employer unless individuals are rejected for cause. Longshoremen work in gangs, from a minimum of 5 to a maximum of 18. The size of the gangs is determined by the nature of the cargo to be loaded or unloaded.

Longshoremen are classified by seniority for purposes of job referral. A qualifying year is, with exceptions not relevant herein, one in which a person has worked at least 700 hours. Consecutive years of at least 700 hours each must be worked to qualify for seniority status. Classifications of seniority are as follows:

| | |
|-----------|----------|
| Gold Star | 25 years |
| A Class | 20 years |
| B Class | 15 years |
| C Class | 10 years |
| D Class | 5 years |
| E Class | 2 years |
| F Class | 1 year |

All others are casual labor. Longshoremen who are qualified to do the work may be assigned to "key" jobs, also known as "positions," or "outside jobs." Those jobs are winch operator, signalman, drivers, and hook-on. All key jobs are performed on the deck, gang plank, or dock and requires training and experience. Degrees of experi-

instance, as described *infra*, I have ruled against the General Counsel and dismissed the allegation because the burden of proof rests with the General Counsel and the evidence failed to establish that the version of Respondent's witness of the disputed event was inherently implausible or contrary to the record as a whole. In this regard, I note that the Board in this case when previously faced with this situation, after Administrative Law Judge Youngblood disqualified himself, remanded the proceeding for a hearing *de novo* despite the agreement of the parties to transfer the case to the Board for decision. Thus, when the General Counsel and the Charging Parties thereafter, as the result of Administrative Law Judge Rasbury's death, again agreed to have this case decided upon the past record, they must have known that there were certain instances in which an evaluation of the demeanor of their witnesses would be indispensable to the factfinder. This circumstance, plus the fact that this proceeding deals with events which for the most part are over 5 years old and it has already been heard by two different judges, leads me to believe that it would not serve any good purpose to remand this case in whole or in part for further proceedings *de novo* before yet another judge.

⁶ The "Background" findings set forth herein are based in part on the "Background" section of the Decision issued on October 17, 1975, by Administrative Law Judge Russell L. Stevens in Cases 23-CB-1635 and 23-CB-1647-1. The parties to this proceeding agreed to accept the findings contained in that section of the Decision as background in the instant case.

ence are required depending on the type of cargo involved, the type of equipment being worked, and the circumstances involved. An applicant may be thoroughly qualified to hook-on, but inept as a winchman. He may be able to drive, but incapable of giving signals to the winchman. He may be qualified to operate one type of winch or crane but not qualified to operate another type of winch or crane. Longshoremen not assigned to key jobs are assigned to work in the hold of the ship, which work requires little, if any, training or experience. Key jobs are preferred by longshoremen because they are physically easier, and are outside rather than in the hold, which usually is hot and uncomfortable. Normally, a person assigned to a job remains at work on that job for the day, except in the case of loading cotton where certain men rotate between the dock and the hold, a practice referred to as "quartering."

Gangs work under the supervision of gang foremen, who assign jobs after the gang arrives shipside and is accepted by the employer. The gang foremen direct the work of the gangs, and are the agents of Respondent in picking up and assigning the work to the members of the gang. The gang foremen work with, and under the supervision of, walking foremen who are employees of the employer and who are in charge of all the gangs working a ship. If a gang foreman is unable to work, or if it is necessary for any reason to replace him, his duties are assigned to a substitute called a fly foreman.

The governing collective-bargaining agreement in effect during the time material herein provides that referrals and work assignments shall be made by Respondent in a nondiscriminatory manner, and without regard to membership in Respondent. Also, Respondent's written "hiring hall rules" in effect during the time material herein provide that "men for work gangs shall be picked up by Gang Foreman for employment . . . on the basis of strict seniority and qualifications, that is, ability being equal, those with the most seniority shall be picked up for work ahead of all those with less seniority." The hiring hall rules further provide that "job assignments within each work gang picked up shall be made by the Gang Foreman on the basis of seniority and qualifications for the particular job."

Before a longshoreman can be included on a list of men eligible for gang foreman, rule 28 of the governing collective-bargaining agreement states that he must meet the following requirements:⁷

- (a) Worked at least 5 consecutive years as a longshoreman unless nomination to gang foreman list is mutually agreed on.
- (b) Attended a 16-hour safety course, as prescribed and administered by the U.S. Department of Labor.
- (c) Qualified to direct any work normally performed by longshoremen.

Gang foremen receive 50 cents an hour over and above other members of the gang. The order in which gang

foremen pick up gangs is determined by, and rotated on the basis of, their gross earnings as gang foreman. The gang foreman with the lowest gross earnings for the year is the first to be assigned when a call for a gang is received.

Before the events material to this case longshoremen interested in becoming gang foreman applied to Respondent and their applications were referred to a five-man gang committee, comprised of Respondent's members, which screened the application and, if approved, referred it to Respondent's membership for a vote. It was not possible to become gang foreman without approval of Respondent's membership. Applications were only considered where there was a vacancy. There were 30 gang foremen, all of whom were members of Respondent. A nonmember has never been a gang foreman or a fly foreman. There were 24 names on the fly foremen list.⁸

Calls for gangs are placed by the employer with Respondent as required, there being five calls each day for work starting at 7 a.m., 8 a.m., 10 a.m., 1 p.m., and 7 p.m. Gangs are made up about 40 minutes before work-starting time. The man next up on the gang foreman list, described above, is selected as a gang foreman—usually the foreman and gang are selected on a day-by-day basis. The gang foreman goes into the hiring area of Respondent's hiring facility, where longshoremen applicants stand in squares designating their seniority status. The squares designate nothing other than seniority. A square may contain both members of Respondent and nonmembers. The gang foreman first goes to the Gold Star square for the selection of his gang. Applicants in that square may not desire that particular gang and so may decline the job offer, hoping to get the job they want when another foreman subsequently comes through. If the foreman is unable to fill his gang from the Gold Star square he goes to the A square and so on down the line, through the F square until he fills his gang. If more men are in a square than are needed, the gang foreman may select the men he wants—seniority within a square is not relevant.

After the gang is made up, it assembles shipside. There the gang foreman and gang members are hired by the employer, unless there is a rejection for cause which almost never happens. The gang foreman then assigns the men to their jobs for the day, with some going to the key positions and others to the hold. All job assignments are required by the governing collective-bargaining agreement to be nondiscriminatory and by Respondent's printed hiring hall rules to be made "on the basis of seniority and qualifications for the particular job."

B. Cases 23-CB-1635 and 23-CB-1647-1

In Cases 23-CB-1635 and 23-CB-1647-1 Respondent was charged with violating Section 8(b)(1)(A) and (2) of the Act in the operation of its exclusive hiring facility by selecting gang foremen and fly foremen during 1974 and 1975 on the basis of membership in Respondent and by

⁷ It appears that these requirements became effective October 1, 1974, and were applied prospectively. Those longshoremen who had been gang foremen prior to that date were not required to meet the requirements.

⁸ The names for gang foreman were selected from the fly foremen list when a vacancy occurred. The use of the fly foreman position enabled Respondent to observe the qualities of a potential gang foreman. A fly foreman is, in effect, an apprentice or hopeful gang foreman.

assigning applicants to key positions on the basis of their membership in Respondent. The General Counsel issued a consolidated complaint based on these charges, and in August 1975 a hearing in said proceedings was held before Administrative Law Judge Russell L. Stevens who, on October 17, 1975, issued his Decision. No statement of exceptions was filed with the Board, so in an unpublished Decision and Order dated December 31, 1975, the Board adopted the findings and conclusions and recommended order of Administrative Law Judge Stevens.

Administrative Law Judge Stevens concluded that Respondent, in the operation of its exclusive hiring facility, violated Section 8(b)(1)(A) and (2) of the Act by maintaining and enforcing two unlawful policies: (1) conditioning the benefit of promotion to gang foreman upon membership in Respondent;⁹ and (2) granting preference to the members of Respondent in the assignment of key positions.¹⁰ With regard to specific allegations of discrimination—eight in number—Administrative Law Judge Stevens dismissed six for lack of evidence and in two instances found Respondent had violated Section 8(b)(1)(A) and (2) of the Act by discriminatorily assigning nonmembers to work in the holds of ships while members of Respondent in lower classifications were assigned to key positions. Specifically, he found that on January 18, 1975, Gang Foreman Rhame assigned a key job to longshoreman Messina, a member of Respondent, rather than nonmember Cherry, because of Messina's membership, and that on February 7, 1975, Gang Foreman Milins assigned key jobs to Respondent's members Criado and Watts rather than Barrientes, because Barrientes was not a member of Respondent.

C. The Questions Presented for Decision

1. Whether a new system instituted by Respondent in December 1975 for the selection of gang foremen and fly foremen, with new requirements, was a sham designed to perpetuate Respondent's illegal practice of selecting gang foremen on the basis of their membership in Respondent, thereby violative of Section 8(b)(1)(A) of the Act.

2. Whether Respondent in December 1975 caused Charging Party Nelson to be defeated in an election for gang foreman because he testified adversely to Respondent at the unfair labor practice hearing conducted by Administrative Law Judge Stevens in Cases 23-CB-1635 and 23-CB-1647-1, thereby violating Section 8(b)(1)(A).

3. Whether between October 14, 1975, and January 19, 1980, Respondent's gang foreman, in assigning, reassigning, or failing to assign key work positions to nonmembers and by otherwise failing to pick up nonmembers for work gangs, discriminated against nonmembers because of their lack of membership in Re-

spondent, thereby causing Respondent to violate Section 8(b)(1)(A) and (2) of the Act.

D. Respondent Changes Its Method of Designating Gang Foremen and Fly Foremen and the Requirements for Said Positions

As indicated *supra*, prior to the issuance of Administrative Law Judge Stevens' Decision in Cases 23-CB-1635 and 23-CB-1647-1, longshoremen interested in filling a gang foreman's vacancy submitted an application to a five-man union gang committee, which screened the application and referred it to the membership for a vote.¹¹ Applications were considered only when there was a vacancy and usually the application of the most senior fly foreman was given preference by the committee. It was not possible to become a gang foreman without the approval of Respondent's membership.

On October 17, 1975, Administrative Law Judge Stevens issued his Decision in Cases 23-CB-1635 and 23-CB-1647-1 wherein he concluded that "[Respondent] requires that all gang and fly foremen hold union membership." This conclusion was based on his further finding that Respondent's president "readily conceded, the requirements of gang committee screening and union membership vote effectively restrict foreman jobs to union members. No outsider is permitted to vote when the membership votes on gang foreman." Accordingly, Administrative Law Judge Stevens concluded that Respondent violated Section 8(b)(1)(A) and (2) of the Act by discriminatorily requiring union membership as a prerequisite for the position of gang foreman and fly foreman and ordered Respondent to cease and desist from this practice.

Upon receipt of Administrative Law Judge Stevens' Decision, Respondent's president and executive board met with Respondent's attorney, Hermann Wright, to discuss the impact of the Decision and in particular the part of the Decision which recommended that the Board order Respondent to change its present method of selecting gang foremen and fly foremen. Respondent's officials and Attorney Wright discussed different methods to comply with this part of recommended Order. Attorney Wright specifically recommended that Respondent select its gang foremen and fly foremen by means of an election in which all longshoremen were eligible to vote. Based on this recommendation Respondent's officials recommended that its membership adopt a new procedure for the selection of gang foremen and fly foremen, as follows:

An election would be held to select new gang foremen and fly foremen. All longshoremen with 2 years of employment seniority—class E longshoremen—would be eligible to vote, regardless of their membership or lack of membership in Respondent. To be a candidate for gang foreman a longshoreman must have been dispatched from Respondent's hiring facility for 10 consecutive years, working not less than 700 qualified hours each year, and have completed the 16-hour safety course spec-

⁹ Administrative Law Judge Stevens stated that he based his finding in large part on the testimony of Gang Foreman Nelson who testified "that the [Respondent's] policy and practice, and his, is to assign jobs through gang foremen partially on the basis of [Respondent's] membership."

¹⁰ Administrative Law Judge Stevens stated that in reaching this conclusion he had taken into account that the record established that membership in Respondent was a requirement for a longshoreman to become a gang foreman and fly foreman and reasoned that "when union membership is a requirement to become a foreman it does not seem likely that such a factor would be ignored in assignment of work positions."

¹¹ The applicants were expected to have the minimum requirements for gang foremen set forth in the collective-bargaining agreement.

ified in the collective-bargaining agreement¹² and be able to speak and understand the English language. If elected to the position of gang foreman, the successful candidate must agree to, among other things, not serve as walking foreman and in assigning members of gangs to specific jobs agree to take into account the seniority and ability of the people in the gang.

The eligibility requirements for voting for fly foremen were the same as those for gang foremen. The eligibility requirements for being a candidate for fly foremen were as follows: A candidate must have been dispatched from Respondent's hiring facility for not less than 5 consecutive years and must have completed the aforesaid 16-hour safety course and agree to comply with all the conditions and requirements imposed on gang foremen. In filling a gang foreman's vacancy, the fly foreman having the most seniority would be moved up first and additional fly foremen would be elected when half of the existing fly foremen on the fly foremen list had been moved up into the gang foreman category.

Pursuant to this new procedure 30 gang foremen and 10 fly foremen were to be elected on successive days, not less than 1 week after the date on which the aforesaid procedure was adopted by Respondent's membership. Each voter was required to vote for a full complement of gang foremen and fly foremen and application blanks for these positions were to be made available in Respondent's office.

By letter dated November 13, 1975, Attorney Wright, on behalf of Respondent, notified the Board's Regional Director for Region 23 that Respondent would comply with Administrative Law Judge Stevens' recommended Order by, among other things, changing its hiring hall procedures pertaining to the selection of gang foremen and fly foremen in the manner set forth above and advised the Regional Director:

... my purpose in tendering this matter to you at this time is in the hope that if you feel that this proposal on its face would not be sufficient to be considered as compliance with the Decision of [Administrative Law Judge Stevens], assuming that we did everything else we were ordered to do, you would advise us so that we would not be engaging in useless action in trying to reach compliance with the Decision of the Administrative Law Judge.

In reply, the Board's Regional Attorney for Region 23, by letter dated November 24, 1975, informed Attorney Wright:

The proposal in selection and designation of fly foremen and gang foremen, as a matter of compliance with this proceeding, appears to remove exclusive union membership and/or union vote in selection and designation of these categories. However, whether or not the prior discriminatory practice is, in fact, eliminated by the proposed modification is a matter upon which we cannot pass. This is a determination to be made pursuant to a full factual investigation,

either in compliance stages of this proceeding or by the filing of subsequent unfair labor practice charges.

On December 8, 1975, Respondent held a special membership meeting at which time Respondent's president, Holland, informed the membership that the meeting had been called to discuss Administrative Law Judge Stevens' Decision and that Respondent's lawyer, Hermann Wright, was there to explain the Decision. Wright explained the Decision and its significance and informed the membership that Respondent had until December 20, 1975, to decide whether to appeal or to comply with the Decision. President Holland informed the membership that Respondent, due to the Decision, needed to change its method of selecting gang foremen and fly foremen. He read to the membership the proposed new system, described *supra*, which Respondent's officials had decided to ask the membership to adopt. Wright answered questions about the proposed new system and in response to questions informed the membership that the Respondent's officials had considered several alternatives but felt that the one which was being submitted for their approval was the best system. The meeting ended with a majority of the membership voting in favor of the new plan for selecting gang and fly foremen.

Thereafter, notices were posted and distributed at Respondent's hiring facility explaining the new system of selecting gang and fly foremen and that elections would be conducted December 15, 1975, for gang foremen and on December 16, 1975, for fly foremen.

The record shows that there were 107 members of Respondent eligible to vote in the election of whom 100 cast ballots, and there were 106 nonmembers eligible to vote of whom 42 cast ballots. Only one nonmember was a candidate for gang foreman and only two were candidates for fly foremen. But the record does not show the number of nonmembers who were eligible to run for either gang or fly foremen pursuant to the requirements set forth in the new procedure. The record does establish that the reason for the small percentage of nonmembers voting was a decision made on the part of nonmembers not to participate in the election.

1. Respondent President Holland allegedly tells members of Respondent "that nonmembers of Respondent, as well as persons of Mexican ancestry, would be disqualified for election to the positions of gang foreman and fly foreman" [complaint par. 11]

In support of this allegation the General Counsel relied on an affidavit submitted to the Board by Ruben Matamoras which was introduced into evidence before Administrative Law Judge Youngblood.¹³ Matamoras was a member of Respondent and a fly foreman during the time material and was a candidate for fly foreman on the December 16 ballot. The General Counsel relies upon that part of Matamoras' affidavit wherein he stated

¹² The present gang foremen who had served in their positions for 8 years were not required to comply with this provision.

¹³ The parties agreed that, because Matamoras was not capable of testifying before Administrative Law Judge Rasbury due to illness, his testimony before Administrative Law Judge Youngblood would be introduced into evidence.

that on or about October 30, 1975, Respondent President Holland told him that he should not be concerned about losing his bid for election to the fly foreman list and that during this conversation Holland stated:

. . . they were trying to eliminate Trinidad Pimentel [a Mexican-American] who was running for fly foreman in order to dissuade other outsiders from filing charges against the union [and] that he [Holland] was going to vote for [Matamoras] and Frank Vargas and that [they] would get most of the votes from the outsiders but that [Holland] would not vote for Pete Vargas because Pete had tried to help Sonny Nelson get elected as president the year before.

Matamoras repudiated his aforesaid affidavit and specifically denied that President Holland told him he was trying to eliminate Pimentel. Matamoras testified that on the date in question he informed Holland that he was opposed to Respondent's plan to having gang foremen and fly foremen elected because he was already on the fly foremen list and felt that he should not have to place his position in jeopardy. Matamoras further testified that in reply Holland told him that he thought the men would vote for candidates such as Matamoras who were qualified and had seniority and stated that Respondent's lawyer had stated that if Respondent was to get out from under the "business of charges" being filed which were similar to the one filed by Pimentel¹⁴ that there had to be some changes in the way in which gang foremen and fly foremen were handled.

The General Counsel, citing *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978), takes the position that I should use Matamoras' affidavit as affirmative evidence and reject the testimony he gave before Administrative Law Judge Youngblood. I disagree. I recognize that the Board in *Alvin J. Bart* held that administrative law judges in proceedings conducted pursuant to Section 10(b) of the Act may under certain circumstances exercise their discretion and disregard a witness' testimony given before the administrative law judge and consider the witness' affidavit as substantive evidence, despite the fact that it conflicted with the witness' testimony. However, one of the most significant circumstances involved in the exercise of such discretion is the demeanor of the witness on the stand while testifying about the disputed matters and the reasons for repudiating his affidavit. Since I was not afforded an opportunity to observe Matamoras testify, I am in no position to determine whether his testimony at the hearing before Administrative Law Judge Youngblood was more reliable than the statements contained in his affidavit or vice versa. I therefore have not considered the matters contained in Matamoras' affidavit as substantive evidence. But, even if I were to consider such affidavit as substantive evidence, I am of the view that the evidence is still insufficient to support this allegation.

¹⁴ Pimentel was one of the charging parties in the consolidated proceeding before Administrative Law Judge Stevens, *supra*, which resulted in his conclusion that Respondent's system of electing gang foremen and fly foremen was illegal.

Based on the foregoing I shall recommend that this allegation be dismissed and I specifically reject the General Counsel's contention that a fair inference from Matamoras' conversation with Holland is that Holland was endorsing a late of candidates with the intention of eliminating outsiders (nonmembers of Respondent) and Nelson.

2. Respondent President Holland allegedly informs members that "Respondent intended to have its members block vote for a particular slate of member candidates supported by Respondent" [complaint par. 15]

In support of this allegation the General Counsel called Rudolph Vargas, a member of Respondent, who prior to the December 1975 election of gang foremen and fly foremen had been a fly foreman. Vargas was a candidate for both gang and fly foreman. He testified that about a week or two before the election he advised Holland, Respondent's president, that he was opposed to the election because he already was a qualified fly foreman and did not understand why he was being forced to seek election for that position. Holland told Vargas not to worry because in view of Vargas' past experience there was no reason why he would not be reelected. Holland showed Vargas a chart used by Respondent for health, welfare, and pension benefits which listed the names of the persons who worked out of Respondent's hiring facility. Holland told Vargas that, assuming that the eligible voters were those listed on this chart, he felt Vargas would be elected. On the subject of nonmembers, Holland stated that he felt "only two outsiders had a chance of running for foreman's job and only one outsider was qualified to run" and "only one outsider qualified to run for fly foreman." Holland did not indicate whether or not he thought the outsiders would be elected. Vargas, who is a Mexican-American, repeated his feeling that it was unfair that he had to run for election and stated he was concerned that some of the voters were prejudiced against Mexican-Americans. Holland replied that because of Administrative Law Judge Stevens' Decision in Cases 23-CB-1635 and 23-CB-1647-1 he thought there would be a tendency for the nonmembers as well as the members to vote for Vargas inasmuch as Vargas was a member of Respondent and a lot of the persons involved in Administrative Law Judge Stevens' case were Mexican-Americans. Vargas stated that he thought that the activities of Pimentel, one of the charging parties in the case decided by Administrative Law Judge Stevens, might be harmful to his effort to be elected. Holland stated that he did not think this was true and felt that Vargas would receive most of the nonunion vote.

There is nothing contained in Vargas' testimony, *supra*, which supports the allegation that Holland told members Respondent intended to have its members block vote for a particular slate of candidates supported by Respondent nor is there anything in the testimony which warrants the inference that Holland or Respondent was endorsing a particular slate of candidates with the intention of eliminating nonmembers. In support of this inference the

General Counsel in his post-hearing brief relies on that portion of Vargas' pretrial affidavit submitted to the Board in which Vargas stated that Holland during this conversation told him in effect that the "outsiders" were outnumbered two to one by union members as far as voting eligibility was concerned and that "only two outsiders had a chance of running for a foreman's job" and that "the only two outsiders who were running would not get elected." Under the circumstances of this case, wherein I was not afforded the opportunity to evaluate Vargas' demeanor, I do not believe that it would be proper for me to use the statements contained in Vargas' affidavit as substantive evidence. In any event, I am of the view that the aforesaid statements contained in Vargas' affidavit are insufficient to support this allegation or the inference that Respondent through its president, Holland, was endorsing a slate of candidates with the intention of eliminating nonunion members.

Based upon the foregoing I shall recommend that this allegation be dismissed.

3. Respondent allegedly "caused Respondent's members to vote against Daniel Floyd Nelson, Jr. for the position of gang foreman because [Nelson] testified adversely to Respondent at the trial in Cases Nos. 23-CB-1635 and 23-CB-1647-1" [complaint par. 16]

Nelson, a member of Respondent for 18 years, at various times has worked on the waterfront as walking foreman, gang foreman, and longshoreman. When Administrative Law Judge Stevens issued his Decision in Cases 23-CB-1635 and 23-CB-1647-1 on October 17, 1975, Nelson was 1 of Respondent's 30 designated gang foremen.

Nelson testified on behalf of the General Counsel before Administrative Law Judge Stevens who, in finding that Respondent's policy was to assign jobs on the basis of membership, relied in large part on Nelson's testimony.

Nelson was a candidate for gang foreman in the December 15, 1975, election, but was defeated. He was the only previously designated gang foreman who was not elected. In support of the allegation that Respondent caused its members to vote against Nelson because of his adverse testimony before Administrative Law Judge Stevens the General Counsel relies on the following: Nelson was the only previously designated gang foreman who failed in his bid for election and that during a meeting of Respondent's members in November 1975 Respondent's president read a portion of Respondent's attorney's brief to Administrative Law Judge Stevens which attacked Nelson's credibility. At the same time Respondent's president told the membership that, "if it would not have been for [Nelson's] testimony, that [Respondent] would not have been found guilty of anything."

In my opinion the evidence presented by the General Counsel is insufficient to support this allegation and I can find no other evidence in the record which by itself or with the foregoing would warrant an inference that Respondent caused its membership to vote against Nelson for the position of gang foreman. I therefore shall recommend that this allegation be dismissed.

4. The new system for the selection of gang foremen and fly foremen with its new requirements was allegedly a sham designed to perpetuate Respondent's prior illegal practice of selecting gang and fly foremen on the basis of their membership in Respondent [complaint pars. 14 and 22]

On October 17, 1975, as described *supra*, Administrative Law Judge Stevens issued his Decision in Cases 23-CB-1635 and 23-CB-1647-1. He concluded that Respondent required gang foremen and fly foremen to hold membership in Respondent. This conclusion was based upon his further finding that Respondent's president had admitted that the requirement of having gang foremen and fly foremen screened by a committee of Respondent's members and a membership vote effectively restricted gang foreman jobs to members of Respondent. Administrative Law Judge Stevens therefore concluded that Respondent violated the Act by discriminatorily requiring membership in Respondent as a prerequisite for the position of gang and fly foremen and he recommended that the Board order Respondent to cease and desist from this practice.

As I have described in detail *supra*, Respondent's officials, upon receipt of Administrative Law Judge Stevens' Decision, after consulting with Respondent's lawyer, promulgated a new system for selecting gang and fly foremen in order to comply with the Order. In December 1975, this new system was instituted. The complaint alleges in effect that the new system with its new requirements was a sham designed to perpetuate Respondent's prior illegal practice of electing gang and fly foremen on the basis of their membership in Respondent. I am not persuaded that a preponderance of the evidence in the record herein supports this conclusion.

Insofar as voting eligibility is concerned, the new procedure on selecting gang and fly foremen was not calculated to favor candidates who were members of Respondent over nonmembers since, as described *supra*, there were virtually the same number of nonmembers eligible to vote as members.

With regard to the ability of longshoremen who were not members of Respondent to meet the qualifications to become a candidate for gang foreman, the General Counsel points to the fact that Respondent added three new requirements: The number years of service requirement was raised from the minimum contractual requirement of 5 consecutive years of work to 10 seniority years; any person elected to the position of gang foreman could not work as a gang foreman for another union; and persons selected to the position of gang foreman could not work as a supervisor for an employer. The General Counsel argues that these added requirements plus the fact that only one nonmember ran for gang foreman establish that the new requirements were calculated to make it impossible for nonmembers to qualify as candidates for gang foreman. I disagree. Although these additional requirements, one of which was in derogation of the minimum standards set out in the governing collective-bargaining agreement, are suspect, I am of the view that they do not warrant an inference that in imposing them, Respondent was motivated by a desire to preclude

nonmembers from becoming candidates for gang foremen. No evidence was presented of the number of nonmembers who were precluded from becoming candidates by the new requirements. The record however does reveal that the great majority of nonmembers decided not to have anything to do with the new system of selecting gang and fly foremen and due to this over 60 percent of the nonmembers eligible to vote chose not to do so. Under the circumstances, it is just as likely that the reason why only one nonmember was a candidate for gang foreman was that the qualified nonmembers chose not to participate in the election.

Based on the foregoing I shall recommend that this allegation be dismissed in its entirety.

*E. The Alleged Discrimination by Gang Foremen in Picking Up Work Gangs and Assigning Jobs*¹⁵

1. On October 14, 1975, Gang Foreman Clement allegedly told job applicants he had to give preference to Respondent's members regardless of seniority and in fact discriminated against nonmember Valle [complaint pars. 8 and 9]

In support of these allegations the General Counsel relies on the testimony of Leonardo Valle, Hector Contreras,¹⁶ Marco Rabago, and Trinidad Pimentel, all of whom during the time material were nonmembers of Respondent and registered at Respondent's hiring facility as class D applicants.

Valle testified that on October 14, 1975, he was in the D square when Gang Foreman Clement picked up a work gang. Clement initially took Valle's card but immediately returned it to Valle with the explanation, "I'm sorry, I have a button man [referring to a member of Respondent]." Valle testified he observed Clement then pick up the card of Alfred Villamil, a member of Respondent, who was classified as a D applicant.

Contreras testified that on October 14, 1975, Gang Foreman Clement, while picking up applicants for his work gang in the D square, took Valle's card but returned it to Valle and thereafter picked up Villamil's card. Contreras was not able to hear what Clement said to Valle. Contreras further testified that after having returned Valle's card Clement, in addition to picking up Villamil's card, also picked up Contreras' card.

Rabago testified that on October 14, 1975, he observed Gang Foreman Clement take Valle's card, that Clement returned it to Valle and that Rabago overheard Clement tell Valle, "I'm sorry I've got a button man," and then observed Clement pick up Villamil's card.

Pimentel testified that on October 14, 1975, there were between 20 to 30 applicants in the D square when Gang Foreman Clement came through to select his work gang. Pimentel further testified that Clement initially picked up Valle's card but that at the same time as he was doing

this Villamil got Clement's attention and Clement returned Valle's card, explaining to Valle, "I'm sorry there is a union man over there that wants to go to work," and went over and took Villamil's card instead.

On behalf of Respondent, Gang Foreman Clement denied the aforesaid conduct attributed to him. He specifically denied taking and then returning Valle's card or indicating to Valle that he was picking up another class D applicant rather than Valle because the other applicant was a "button man" or a member of Respondent. With regard to the work gang he selected on October 14, 1975, Clement testified that nine of the gang were class D applicants, three of whom were nonmembers and that one nonmember was selected after Villamil. His testimony in this respect was corroborated by the gang ticket for that date. The fact that the record reveals that other gang foremen occasionally do not list the applicants on their gang tickets in the order of selection does not establish that Clement was not telling the truth when he testified that on October 14, 1975, he listed the applicants he selected in the order in which he selected them. Although Pimentel specifically denied that on October 14, 1975, Clement picked three applicants after having picked Villamil, Pimentel did not deny that Clement picked up a nonmember applicant after having picked Villamil.¹⁷

If Clement's testimony, set forth above, is credited it refutes the evidence presented by the General Counsel. There is nothing inherently incredible about Clement's testimony nor does the record as a whole demonstrate that his testimony was incredible. Quite the opposite, it is difficult to believe that 2 months after the extensive litigation before Administrative Law Judge Stevens in Cases 23-CB-1635 and 23-CB-1647-1 that Clement would have *publicly announced* that he was selecting one of his work gang on the basis of membership in Respondent. Under these circumstances, I am of the opinion that the General Counsel failed to establish by a preponderance of the evidence that Gang Foreman Clement engaged in the conduct attributed to him. I therefore shall recommend that these allegations be dismissed.

2. On October 25, 1975, Gang Foreman Enfinger allegedly discriminated against nonmember Mata in the assignment of work [complaint par. 10]

In support of this allegation, the General Counsel called Martin Mata and Trinidad Pimentel, both of whom during the time material were not members of Respondent. Pimentel was a class D applicant whereas Mata was a class C applicant. They testified that during the evening of October 25, 1975, they were selected by Gang Foreman Enfinger to work in his gang. They further testified that when the work gang arrived shipside Enfinger assigned Mata and Pimentel to work in the hold of the ship and assigned Gabriel "People" Socias, a member of Respondent who was a class D applicant, to work as a signalman which was a key position.

¹⁵ The General Counsel presented no evidence in support of par. 13 of the complaint which in essence alleges that Gang Foreman Burrow discriminated in the assignment of work on about November 28, 1975. I therefore shall recommend that this allegation be dismissed.

¹⁶ In view of Contreras' death, his testimony given before Administrative Law Judge Youngblood was stipulated into the record made before Administrative Law Judge Rasbury.

¹⁷ I note that the testimony of Contreras corroborates Clement's testimony in this respect although Contreras was mistaken insofar as he testified that the nonmember picked up following Villamil's selection was Contreras.

Mata, a Mexican-American, whose ability to speak English is limited, testified that he had previously worked as a signalman and that the ability to speak English was not a prerequisite for this job because the signalman gives his various instructions by means of hand signals. Pimentel corroborated Mata's testimony in this respect, testifying that on one occasion Mata had worked as signalman on a work gang in which Pimentel had worked and that on several other occasions Pimentel had observed Mata working as a signalman.

The aforesaid testimony of Mata and Pimentel was not contradicted. Gang Foreman Enfinger did not testify. Respondent's contention that the reason for Enfinger's failure to testify before Administrative Law Judge Rasbury was that he lived more than 100 miles from the site of the hearing, thus precluding Respondent from subpoenaing him, is frivolous in view of Section 11 of the Act.

In summation, the General Counsel has established that, although Mata had the ability to perform the work of signalman, on October 25, 1975, Gang Foreman Enfinger assigned this position to applicant Socias despite the fact that Mata had more seniority than Socias and that Respondent's hiring hall rules provide that "job assignments within each work gang picked up shall be made by the gang foreman on the basis of seniority and qualifications for the particular job." These circumstances plus the failure of Respondent to introduce any evidence explaining Enfinger's failure to assign Mata rather than Socias to the preferred position of signalman, when viewed in the context of the Board's conclusion in Cases 23-CB-1635 and 23-CB-1647-1 that Respondent had a policy of granting preference to members of Respondent in the assignment of key positions, warrant the inference that Enfinger's assignment of Socias rather than Mata to the key position of signalman on October 25, 1975, was motivated by his knowledge that Socias was a member of Respondent and Mata was not. I therefore find that by engaging in such conduct Respondent, through Gang Foreman Enfinger, violated Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint.

3. On October 31, 1975, Gang Foreman Russo allegedly discriminated against nonmember Morales in the assignment of a key position [complaint par. 12]

The testimony of the General Counsel's witnesses Pimentel and Rabago establish that on October 31, 1975, Gang Foreman Russo picked up a gang to load sacks of grain on a ship located at Pier 18 and that when the gang arrived at shipside Russo assigned the key position of hooking-on to class D applicant Socias, who was a member of Respondent, rather than to Morales, a class C applicant, who was not a member of Respondent. The further testimony of Pimentel and Rabago establishes that previously Morales had performed the work of hooking-on a number of times, including the kind of hooking-on involved in the October 31, 1975, job. Respondent presented no evidence that Morales was not qualified to perform the work of hooking-on in general or in connection with the October 31, 1975, job.

In summation, the record establishes that Morales, who was not a member of Respondent, was qualified to

perform the key job of hooking-on, yet Gang Foreman Russo on October 31, 1975, assigned this job to a less senior employee who was a member of Respondent. These circumstances, when viewed in the context of Respondent's hiring hall rule which mandates the assignment of key jobs on the basis of seniority unless the less senior worker is not qualified to do the work, plus the Board's finding in Cases 23-CB-1635 and 23-CB-1647-1 that Respondent, despite its hiring hall rules, had a policy of granting preference to Respondent's members in the assignment of key positions, warrant the inference that on October 31, 1975, Russo's selection of Socias rather than Morales for the key position of hooking-on was motivated by Russo's knowledge that Socias was a member of Respondent whereas Morales was not.¹⁸ I therefore find that by engaging in such conduct Respondent, through Gang Foreman Russo, violated Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint.

4. On December 19, 1975, Gang Foreman Herrera allegedly stated that Respondent instructed gang foremen that even though nonmembers were eligible for key positions that they should be removed from key positions if they erred [complaint par. 17]

It is undisputed that on December 19, 1975, nonmember Valle was picked up by Gang Foreman Herrera and assigned one of the two winch operator jobs which was a key position. The particular winches involved operated by means of a swinging boom. It is undisputed that Valle had never previously operated this type of winch and he admitted his lack of experience to the other winch operator, Pimentel, who gave him instructions. Thereafter, Valle experienced difficulty in operating the winch. He dropped some sacks which were being loaded and they fell into the hold of the ship. This resulted in Walking Foreman Hyatt directing Gang Foreman Herrera to remove Valle from the position of winch operator and replace him with a more experienced operator. Herrera followed Hyatt's instruction.

The other winch operator, Pimentel, was of the opinion that Herrera had not given Valle a sufficient amount of time to familiarize himself with the winch before removing him and he expressed this point of view to signalman Laredo. Pimentel further testified that Herrera overheard his conversation with Laredo and informed Pimentel "that at the foreman's meeting last night that they told him that they would have to give outsiders or the nonmembers positions or outside jobs but if they could not take care of them, for them to take them off and if they would not take them off that they would find foremen that would take them off." Herrera, a witness

¹⁸ I have not drawn any adverse inference from Respondent's failure to call Russo as a witness to controvert the testimony of the General Counsel's witnesses inasmuch as Russo died prior to the hearing before Administrative Law Judge Youngblood. However, I note that Respondent failed to call one witness to controvert the testimony of Pimentel and Rabago that Morales was well qualified to perform the key job of hooking-on.

for Respondent, specifically denied making the aforesaid statement or that he ever received such instructions.

There is nothing inherently implausible about Herrera's denial of the statement attributed to him by Pimentel nor does the record as a whole make Pimentel's testimony more probable than Herrera's denial. It is for these reasons that I am of the opinion that the General Counsel has not proven this allegation by a preponderance of the evidence and shall recommend its dismissal.¹⁹

5. On or about December 25, 1975, Gang Foreman Van Slyke allegedly reassigned a key position from a nonmember to a member [complaint par. 18]

In support of this allegation, the General Counsel relies on the testimony of Contreras²⁰ and Pimentel both of whom are nonmembers of Respondent and were classified as D applicants during the time material.

Contreras testified that on December 6, 1975, Gang Foreman Van Slyke picked him up for his gang which was to load cotton and, when they arrived at shipside, asked him if he wanted to operate the winch, if not he would assign the job to an E applicant who was a member of Respondent. Contreras indicated he would operate the winch. The winch which Contreras was assigned to operate, Contreras testified, was a "slow winch" and after operating it for about 15 minutes Gang Foreman Van Slyke told him he was operating it too slowly and replaced him with David Gray, a class E applicant who was a member of Respondent. Contreras was reassigned to Gray's key position of driving on the dock. He did this for about 3 hours and then was assigned to work in the hold under the quartering system which applies to the loading and unloading of cotton. Contreras testified that Gray was not able to operate the winch any faster than Contreras had been operating it.

Pimentel testified that on December 6, 1975, he was working with a work gang on the same ship as Van Slyke's gang and noticed Contreras was initially operating a winch but that later in the day he was replaced by Gray. On cross-examination Pimentel testified that his diary shows that he observed the above on December 26, 1975, not December 6, 1975. When Pimentel testified before Administrative Law Judge Youngblood he testified that the above took place on December 26, 1975, not December 6, 1975.

Van Slyke, a witness for Respondent, specifically denied ever engaging in the above-described conduct attributed to him.²¹

¹⁹ Even assuming that, as Pimentel testified, Herrera told Pimentel that Respondent had instructed his gang foremen that they would have to assign nonmembers to key positions but that if the nonmembers could not properly perform in such positions the gang foremen would have to remove them, this did not constitute the kind of a statement which was calculated to restrain or coerce employees in the exercise of their Sec. 7 rights, thus it did not violate Sec. 8(b)(1)(A) as alleged in the complaint.

²⁰ Since Contreras died prior to the hearing *de novo* before Administrative Law Judge Rasbury, the parties stipulated into the record his testimony given before Administrative Law Judge Youngblood.

²¹ Since Van Slyke died prior to the hearing *de novo* before Administrative Law Judge Rasbury, the parties stipulated into the record his testimony given before Administrative Law Judge Youngblood.

The record establishes that Contreras was dispatched from Respondent's hiring facility on December 4, 6, 9, 10, 11, 18, and 30, during December 1975, and that Van Slyke was Contreras' gang foreman on only one of these occasions—December 4, 1975.

I am of the opinion that the instant allegation must be dismissed because, contrary to the General Counsel's contention I cannot, in the face of the unequivocal testimony of Pimentel and Contreras, conclude that the alleged unfair labor practice took place on December 4, 1975, and, in view of this, the inference is just as likely that, assuming the incident did occur, a gang foreman other than Van Slyke was involved. In other words, the allegation herein does not encompass the evidence presented. I therefore shall recommend that this allegation of the complaint be dismissed.²²

6. On December 30, 1975, Gang Foreman Rhame, in picking up a work gang, allegedly bypassed class D nonmembers and instead sought to pick his son [complaint par. 19]

On December 30, 1975, Gang Foreman Rhame picked up a work gang. At the time there were a substantial number of applicants in the hiring facility's D square, members and nonmembers, including nonmembers Pimentel, Rabago, and Contreras. Rhame picked up six applicants from the D square and left the area. Pimentel, Rabago, and Contreras were not among the applicants picked up by Rhame, but they were eventually selected by another gang foreman to work on the same ship as Rhame's gang. It is undisputed that among the men working in Rhame's gang that day was nonmember Jose Cardona who was classified as an F applicant. Over Respondent's objection, Pimentel, Rabago, and Contreras testified to conversations with Cardona about the circumstances surrounding his selection by Rhame.

Rabago and Pimentel testified in effect that Cardona told them he had observed Rhame about to pick up Rhame's son, who was a casual applicant, and when Cardona objected Rhame picked up Cardona instead.²³

Contreras testified that Cardona told him that after picking up the applicants in the D square Rhame was lacking one man and was in the process of picking up the man he lacked when Cardona called out to Rhame who picked him up.

Rhame testified that on the day in question after picking up six men from the D square he thought he had completed his gang so he left the hiring area to fill out his gang ticket; that he was doing this when he discovered he was in fact one man short so he immediately returned to the hiring hall to secure an additional person;

²² Assuming that I have erred in concluding that the allegation does not encompass the evidence presented in the record, I would still recommend dismissal for the reason that there is nothing inherently incredible about Van Slyke's denial that he engaged in the conduct attributed to him nor does the whole record make it more probable that the General Counsel's witnesses were more credible than Van Slyke.

²³ On cross-examination Pimentel testified he was not sure whether he had personally talked to Cardona about this matter or learned what Cardona had stated from talking with Contreras. His affidavit submitted to the Board February 25, 1976, does not mention any conversation with Cardona.

that the shape-up was basically over when he got back to the hiring facility; that he went among the applicants still in the facility seeking a D man and when he was unable to find one he asked for E men; that, finding none, he asked if there was an F man available and of the several who responded he took Cardona's card. Rhame specifically denied having attempted to pick up his son.

The General Counsel, in support of this allegation, relies on the hearsay testimony of Pimentel and Rabago that Cardona told them he had observed Gang Foreman Rhame attempt to pick up his son. I am of the view that this type of testimony, allowed over the objection of Respondent, is insufficient to support the instant allegation and for this reason shall recommend that the allegation be dismissed. In any event, Gang Foreman Rhame, as described *supra*, specifically denied engaging in the conduct attributed to him and his version of the events of that day is not inherently implausible and is supported by Cardona's version of the events, as testified to by Contreras. Thus, even if the hearsay testimony of Rabago and Pimentel with Cardona is admissible for the truth of subject matter, I am still of the opinion that the General Counsel has not met his burden of proving this allegation by a preponderance of the evidence. I therefore shall recommend that this allegation be dismissed.

7. On January 28, 1976, Gang Foreman Fontenot allegedly discriminated against nonmember Pimentel [complaint par. 20]

Pimentel is not a member of Respondent and during the time material was a class D applicant. He testified that on January 28, 1976, he was standing in the D square when Gang Foreman Fontenot was picking up his work gang, that Fontenot picked up several D applicants but did not include Pimentel. Pimentel further testified that he specifically indicated to Fontenot that he wanted to work in his gang. It is undisputed that Fontenot later picked up David Gray, a member of Respondent who was a class E applicant. The General Counsel contends that, by refusing to employ Pimentel and later employing Gray, a less senior applicant, Fontenot discriminated against Pimentel on the basis of union membership.

The record reveals that on January 28, 1976, Fontenot picked up 12 D applicants, 6 of whom were not members of Respondent, including Rabago who with Pimentel was a charging party in the litigation before Administrative Law Judge Stevens in Cases 23-CB-1635 and 23-CB-1647-1. It is also undisputed that on "many times" prior to January 28, 1976, Fontenot had picked up Pimentel when Pimentel had indicated he wanted to work for Fontenot.

Fontenot specifically denied having refused on January 28, 1976, to pick up Pimentel. There is nothing in the record which makes his testimony inherently incredible. Quite the contrary, the fact that in the past Fontenot had frequently picked up Pimentel and the fact that on January 28, 1976, he had picked up six applicants from the D square who were not members of Respondent, including Rabago, lends plausibility to his denial. Under the circumstances, I am of the opinion that the General Counsel has not established this allegation by a preponderance

of the evidence. Therefore, I shall recommend the dismissal of this allegation.

8. On January 28, 1976, Gang Foreman Lauzon allegedly refused to accept Pimentel's card for work until Lauzon asked whether any other applicant desired to work [complaint par. 21(a)]

Pimentel testified that on January 28, 1976, Gang Foreman Lauzon came to the D square to pick up applicants for a work gang, that Pimentel repeatedly indicated to Lauzon that he wanted to work in his gang, that Lauzon ignored Pimentel and only accepted Pimentel's card when it became apparent to Lauzon that none of the remaining class D applicants desired to work for him.

Lauzon specifically denied Pimentel's above-described testimony and testified that he picked up all of the applicants who were in the D square and that Pimentel was the last one he picked up.

The record establishes that on January 28, 1976, Lauzon picked up five applicants from the D square, three of whom, including Pimentel, were not members of Respondent.

The record establishes that in picking up applicants from a particular class the gang foreman may pick and choose regardless of seniority within that class. This circumstance, plus the fact that Lauzon, prior to picking up Pimentel, had picked up two other nonmembers in the D square, militates against a finding that by ignoring Pimentel until no other D applicant was willing to accept a job with him Lauzon was intent on discriminating against Pimentel because he was not a member of Respondent. Accordingly, even assuming that Pimentel's testimony is more credible than Lauzon's, it does not establish a violation of the Act. I therefore shall recommend that this allegation be dismissed.

9. On February 17, 1977, Gang Foreman Maples allegedly discriminated against nonmember Rabago [complaint par. 21(b)]

On February 17, 1977, Gang Foreman Maples' gang was loading 100-pound sacks of potatoes. The winches involved were the kind which have swinging booms. The longshoremen working in the hold of the ship were situated directly underneath the booms and there was no place for them to go for safety purposes if sacks of potatoes fell while they were being loaded.

One of the applicants picked up by Gang Foreman Maples for this crew was Marco Rabago, a class D applicant who was not a member of Respondent. Prior to February 17, 1977, Rabago had operated a winch "a few times," but had not operated a winch for Maples. There is no evidence that he had ever operated a winch with a swinging boom or under the dangerous circumstances herein.

Rabago testified before Administrative Law Judge Rasbury that when Maples' gang arrived shipside, Rabago asked Maples, if he could operate the winch and Maples told him "no" because he intended to get another man to operate the winch. However, before Administrative Law Judge Youngblood, Rabago testified that he asked Maples, "can I try to run the winch."

It is undisputed that Maples assigned David Gray, a class E applicant who is a member of Respondent, to operate the winch and that Maples got Gray from another gang. Rabago's assignment that day was the key position of driver, a position which like the position of winch operator allowed him to work an hour and be off for the next hour.²⁴

Maples testified that on February 17, 1977, he asked Rabago if he could operate the winch, whereupon Rabago answered that he did not know if he could but he would try. Maples testified that he told Rabago in effect that it was not sufficient for him to "try" since the loading was being done in the hatchway thus creating a potentially dangerous situation for the men in the hold doing the loading. Since there was no one else on his crew that was qualified to operate a winch, Maples testified that he asked another gang foreman whose gang was working in the area for a man and succeeded in trading one of his men for David Gray who was qualified to operate the winch. Rabago was assigned the key position of driving which paid the same as the winch operator position and like the winch operator position allowed him to take an hour off for each hour he worked.

Since the dangerous conditions existing herein made it important that the gang foreman assign the winch operator position to an experienced applicant, Gang Foreman Maples' assignment of the position to a person other than Rabago, in view of Rabago's expression of doubt as to whether he was capable of operating the winch, was a reasonable assignment. I realize that there is a conflict between Rabago and Maples concerning the words used by Rabago during their conversation about the winch position, however, as I have noted *supra*, Rabago, before Administrative Law Judge Youngblood, testified that he asked Maples whether he could "try" to operate the winch, hardly an expression calculated to assure Maples that Rabago was qualified to operate under such dangerous conditions, and which casts doubt on Rabago's subsequent testimony given before Administrative Law Judge Rasbury that he unequivocally asked to operate the winch. Moreover, any doubt that Gang Foreman Maples discriminated against Rabago by not assigning him to the position of winch operator is removed by the fact that Maples assigned him to the equally desirable job of driver. It is for all of these reasons that I am of the opinion that the General Counsel has not proven this allegation by a preponderance of the evidence. I therefore shall recommend that this allegation be dismissed.

10. On March 19, 1977, Gang Foreman Taylor allegedly discriminated against nonmember Pimentel [complaint par. 21(c)]

The facts pertinent to this allegation are undisputed. On March 19, 1977, after picking up his work gang, Gang Foreman LeRoy Taylor assigned the key positions to E. L. Taylor, A. Rabago, Pimentel, Greco, A. Conti,

and N. Conti. All were members of Respondent except for Pimentel. E. L. Taylor, Rabago, and Pimentel were D applicants whereas Greco and the Conti brothers were E applicants. E. L. Taylor and Greco were assigned to the positions of winch operators, Pimentel and Rabago to the positions of driver. One of the Conti brothers was assigned to the signalman position and the other to hook-on. Soon after the start of work it became apparent that E. L. Taylor was having difficulty operating the winch, so Gang Foreman LeRoy Taylor took him off the winch and replaced him with the Conti brothers who had been working as signalman and was the closest person to the winch.

The General Counsel, as alleged in the complaint, contends that Gang Foreman Taylor's conduct in assigning the less senior Greco to the position of winch operator rather than Pimentel and thereafter assigning the less senior Conti to replace E. L. Taylor, rather than replacing him with Pimentel, violated the Act because in making these assignments Taylor was motivated by the fact that Pimentel was not a member of Respondent. In support of this claim the General Counsel notes that the key position of winch operator on this gang was a more desirable position than any of the other key positions inasmuch as the winch operator was off an hour for each hour worked; Pimentel was qualified to operate the winch; Pimentel had more seniority than either Greco or Conti; Respondent's hiring hall rules provide that job assignments must be made on the basis of seniority and qualifications; and Taylor gave no explanation for his failure to assign one of the winch positions to Pimentel rather than Greco.

I have considered the General Counsel's argument and am of the opinion that the record does not sustain this allegation by a preponderance of the evidence. Whatever inference of illegal discrimination would normally flow from Gang Foreman Taylor's assignment of Greco and Conti to the winch position, rather than the more senior Pimentel, was neutralized by Taylor's failure also to assign the winch position to the more senior A. Rabago, a member of Respondent, who with Pimentel was assigned the key positions of driver. Also, the Board's conclusion in Cases 23-CB-1635 and 23-CB-1647-1 that Respondent had a policy of granting preference to Respondent's members over nonmembers in the assignment of key positions in 1974 and 1975 is too remote in time to the instant allegation, which involves an event which occurred in 1977, to be used to buttress the General Counsel's case.²⁵ In fact, it appears that in late 1975 or early 1976 Respondent, upon receipt of Administrative Law Judge Stevens' Decision in those cases attempted to comply with the Decision rather than challenge the validity of Administrative Law Judge Stevens' conclusion that in the past Respondent had a policy of giving preference to nonmembers in the assignment of key positions.

Based on the foregoing I am of the opinion that the evidence presented is insufficient to establish that Gang Foreman Taylor's failure to assign the key position of

²⁴ Rabago testified before Administrative Law Judge Rasbury that he did not remember if the driving job allowed him to work an hour and be off an hour, but before Administrative Law Judge Youngblood he acknowledged that he worked "an hour on and an hour off driving." Maples testified that on February 17, 1977, Rabago worked an hour on and an hour off driving.

²⁵ Likewise, for this reason I have not considered the Board's Decision in Cases 23-CB-1635 and 23-CB-1647-1 in evaluating the remaining allegations discussed *infra*.

winch operator to Pimentel on March 19, 1977, was discriminatorily motivated. I therefore shall recommend that this allegation be dismissed.

11. On October 27, 1979, Gang Foreman DeLeon allegedly discriminated against nonmember Mata [complaint, par. 21(d)]

On October 27, 1979, Gang Foreman DeLeon assigned the key job of hooking-on to class B applicants Criado, Morales, and Barrientes and class C applicant Juarigue,²⁶ all of whom were members of Respondent except for Barrientes. The General Counsel contends, as alleged in the complaint, that Respondent violated the Act when Gang Foreman DeLeon assigned Juarigue and Criado to the key positions of hooking-on rather than the more senior Martin Mata, who was a class B applicant but unlike Juarigue and Criado was not a member of Respondent.

It is undisputed that on the date in question Mata was assigned by DeLeon to work in the hold of the ship, but immediately thereafter DeLeon learned that it would be necessary for him to have one longshoreman on the deck of the ship gathering "pineapples" (a reference to connecting devices) for the longshoremen in the hold and assigned this position to Mata. The result was that, due to the nature of his job, Mata ended up pending most of the night on the deck of the ship doing virtually nothing. His assignment was the easiest job that anyone in the gang could have been assigned that night. It is also undisputed that the actual act of hooking-on that night required the assignment of four men and that the persons he assigned to this position were required to drive forklifts to transport the containers. Mata admittedly is not qualified to drive.

Mata testified that at the beginning of the work shift he asked Gang Foreman DeLeon why Juarigue, instead of himself, was hooking-on and DeLeon answered that Mata did not know how to drive.

DeLeon testified in effect that when questioned by Mata about being assigned to the hold rather than to the position of hooking-on he explained that the work of hooking-on for this job required driving ability which Mata did not have and he felt that the work was too heavy for Mata who was 60 years old.²⁷ Mata indicated he disagreed that the work was too heavy for him but, according to DeLeon, eventually indicated he agreed with DeLeon, stating that since it was kind of foggy he might slip and fall down.

The General Counsel, as alleged in the complaint, contends that Respondent violated the Act when Gang Foreman DeLeon assigned Juarigue and Criado to the key positions of hooking-on rather than assign this position to the more senior Mata who, unlike Juarigue and Criado, was not a member of Respondent. The General Counsel asks that I infer that DeLeon's failure to assign

Mata to the hooking-on position was because of his lack of membership in Respondent. I am unable to draw this inference. As indicated *supra*, one of the applicants assigned to hooking-on by DeLeon was not a member of Respondent. But, more significant is that DeLeon's explanation of why he did not assign Mata to hooking-on is not inherently implausible and is made even more plausible by DeLeon's subsequent conduct of assigning him to the easiest position in the work gang, hardly an indication that he was intent on discriminating against Mata because of his nonmembership. Under the circumstances, I am of the view that the General Counsel has failed to establish this allegation by a preponderance of the evidence. I therefore shall recommend the dismissal of this allegation.

12. On January 19, 1980, Gang Foreman Vargas allegedly discriminated against nonmember Mata [complaint par. 21(e)]

This allegation involves the alleged failure of Gang Foreman Vargas on January 19, 1980, to pick up applicant Mata for his work gang. Mata, who is not a member of Respondent, is a class B applicant. It is undisputed that Vargas, for his January 19, 1980, work gang, picked up 22 applicants including 7 nonmembers of whom 2 were classified "gold star" were "A" 1- "B" and 1 "casual."

Mata testified as follows: On January 19, 1980, at approximately 6:20 he was in the B square with class B applicant Thomas Morales, who was a member of Respondent; they were the only remaining B applicants; when Gang Foreman Vargas came through picking up his crew he asked Morales if he wanted to work for him; Morales apparently declined the offer and Vargas ignored Mata even though Mata tried to get Vargas' attention by calling out to him four or five times. Vargas then went to the C square where he picked up two C applicants who were members of Respondent. Mata immediately went to the office of the business agent and complained to Assistant Business Agent Nash that Vargas had taken two C applicants but had not given him a job. Nash took Mata's card and went to the office where Vargas was writing up his gang ticket and placed Mata's card in front of Vargas, but said nothing to Vargas. Mata complained that Vargas in picking up his gang had not respected seniority. Mata, whose English is limited, later sought the assistance of longshoreman Rabago and together they visited Nash with Rabago speaking on Mata's behalf. Nash advised them to speak about the matter to Respondent's president, if Mata felt he had been treated unfairly.

Rabago testified as follows: On January 19, 1980, Mata asked him to speak on his behalf to Assistant Business Manager Nash and ask why Gang Foreman Vargas had not given him a job that morning. Rabago, accompanied by Mata, asked Nash why Vargas had not given Mata a job. Nash answered that Vargas had in fact asked Mata to work for him and that if Mata felt he had been treated unfairly to speak to Respondent's president about the matter.

²⁶ Based on the testimony of Mata. The gang foreman's ticket indicates that class B applicant Latrache rather than Criado was hooking-on; however, Gang Foreman DeLeon did not dispute Mata's testimony in this respect and it was corroborated by Rabago's testimony that he observed Criado hooking-on.

²⁷ The record indicates that the work in the hold was not as strenuous as the kind of hooking-on involved in this job.

Vargas testified as follows. On January 19, 1980, he went from square to square picking up his crew, which was the normal procedure, and when he came to the B square he picked up five applicants, one of whom was a nonmember, which left only Morales and Mata in that square. When Vargas first came to the B square he had sufficient vacancies for all seven of the applicants left in that square so he addressed everyone as a group and asked if they were ready to go to work for him, but only five of the seven B applicants indicated they desired to work for him. However, before leaving the square Vargas specifically yelled out to Morales the number of the pier his gang was working, but Morales indicated he was not interested. Vargas also observed that Mata, who was in the same vicinity as Morales, was moving back in the square with his attention directed toward the other gang foremen who were in the process of selecting their gangs. Vargas took this to mean that Mata was "job shopping" and was not interested in working for him, so he moved off to the C square where he picked up two applicants both of whom were members of Respondent. It was only after he had picked up these two C applicants that Vargas observed Mata yelling at him.²⁸ Thereafter Mata, accompanied by Nash, came to the room where Vargas was writing up his gang ticket. Mata complained that Vargas had deliberately failed to pick him up. Vargas told Nash that when he had gone through the B square Mata had not indicated he wanted to work for him so Vargas had immediately gone to the next square.

Nash testified as follows: On January 19, 1980, he was the person in charge of the operation of the hiring facility and, as was his custom, he observed the several gang foremen pick up their work gangs. During the period when Gang Foreman Vargas was at the B square picking up applicants, Nash observed that Mata instead of paying attention to Vargas was looking toward the gang foreman who was following Vargas. However, that gang foreman, when he reached the B square, only needed one applicant and he picked Morales, at which point Mata walked toward the C square where Vargas had just picked up two applicants and said something to Vargas and then came to Nash's office and complained that Vargas had not offered him a job. Nash informed Mata that he had observed what had taken place but, if Mata insisted upon speaking to Vargas, Nash would accompany him. Nash and Mata went to the office where Vargas was writing up his gang ticket at which time Vargas, in answer to Mata's complaint, stated he had offered him a position and that when Mata had not responded Vargas had gone on to the next square. Mata insisted that he was entitled to a job on Vargas' gang and a little later returned with Rabago to Nash's office. Rabago stated that Mata wanted to know what had happened. Nash explained, but Mata insisted he was entitled to a job whereupon Nash advised them to talk to Respondent's president.

As indicated *supra*, this allegation involves sharply conflicting versions of the crucial event. Mata insists that

²⁸ Rabago, as well as Vargas, testified that once a gang foreman has left one square for the next one there is an unwritten practice that the gang foreman does not go back to the previous square.

he expressly indicated to Gang Foreman Vargas his desire to work on Vargas' gang. Vargas insisted that Mata was so busy "job shopping" that it was a case of Mata ignoring Vargas rather than the other way around. The record as a whole does not indicate that Vargas' testimony in this respect was inherently incredible or contrary to the whole record. Quite the contrary, I am of the opinion that the inherent probabilities favor Vargas' version of what took place, because there is nothing in the record to indicate why, if Vargas was intent on discriminating against Mata because he was not a member of Respondent, Vargas picked up several applicants who were nonmembers including one class B applicant and one casual. It is for these reasons that I am of the opinion that the General Counsel has not proven this allegation by a preponderance of the evidence. I therefore shall recommend the dismissal of this allegation.

Upon the basis of the foregoing findings of fact and the entire record, I make the following:

CONCLUSIONS OF LAW

1. West Gulf Maritime Association is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, International Longshoremen's Association, Local No. 307, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. On October 25, 1975, Respondent, in the operation of its exclusive hiring facility, through Gang Foreman Enfinger, assigned the position of signalman to Gabriel Socias rather than to Martin Mata because Socias was a member of Respondent and Mata was not a member, thereby violating Section 8(b)(1)(A) and (2) of the Act.

4. On October 31, 1975, Respondent, in the operation of its exclusive hiring facility, through Gang Foreman Russo, assigned the position of hooking-on to Gabriel Socias rather than to Thomas Morales because Socias was a member of Respondent and Morales was not a member, thereby violating Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act. Since the unfair labor practices found herein are a repetition of certain of the unfair labor practices found by the Board to have been committed by Respondent in Cases 23-CB-1635 and 23-CB-1647-1, it indicates Respondent has a proclivity to violate the Act, thus warranting a broad cease and desist order. See *Hickmott Foods Inc.*, 242 NLRB 1357 (1979).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ²⁹

The Respondent, International Longshoremen's Association, Local No. 307, AFL-CIO, Galveston, Texas, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Discriminating against employees or applicants for employment in the assignment of jobs through its exclusive hiring facility because of their lack of membership in Respondent.

(b) Causing or attempting to cause West Gulf Maritime Association or any of its employer-members, or any other employer engaged in commerce, to discriminate against employees or applicants for employment in violation of Section 8(a)(3) of the Act.

(c) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in its business office, hiring hall, and meeting places, including all places

²⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

where notices to its members are customarily posted, copies of the attached notice marked "Appendix."³⁰ Copies of said notices, on forms provided by the Regional Director for Region 23, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notices to the Regional Director for Region 23, for posting by Gulf Maritime Association at all locations where notices to employees of its employer-members are customarily posted, if said employers are willing to do so.

(c) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

³⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."